Double J Services, Inc. *and* Local 337, International Brotherhood of Teamsters.[1] Case 7–RC–22798

July 28, 2006

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held December 2, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 9 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and, contrary to the hearing officer's recommendation, finds that the Employer's changes in work policies on October 20, 2004,[2] Supervisor James Jones' creation of an impression of surveillance, and Jones' interrogation of employee Patrick Terris constituted objectionable conduct that warrants setting aside the election and directing that a new election be held.[3]

1. *Change in Work Policies*—The Employer provides lumper services for its customer Gordon Food Services at several locations, including at Gordon's Brighton, Michigan distribution center. The unit employees are lumpers who work at the Brighton facility. These lumpers palletize loads coming off trucks for storage in the distribution center. The lumpers are paid a flat rate per truck. They are not paid for time spent waiting for a truck. Sometimes lumpers assist other lumpers, rather than just await their next assignment, but they are not required to do so.

The Employer maintains an office on the first floor of Gordon's facility, near the dock. Adjacent to the Employer's office is a waiting room. Although lumpers receive one scheduled break per shift, they also congregate in the waiting room, adjacent to the Employer's office, when not on assignment. Lumpers eat and drink while in the waiting room.

On October 15, the Petitioner filed a petition to represent the lumpers at the Brighton facility. On October 20, Third-Shift Supervisor Kyle Buckingham called a meeting for all third-shift lumpers. At the meeting, he read a letter from Employer's daily operations manager, Don Watson, which outlined several new work rules.[4] The letter announced that: (1) lumpers would no longer be permitted to eat and drink anything other than bottled water in the waiting room; (2) lumpers were no longer permitted to spend time between assignments in the waiting room; (3) between assignments, lumpers were required to assist other lumpers; (4) lumpers' only break would be their 1 to 1:30 a.m. lunchbreak; and (5) lumpers were not permitted to take more than 4 hours on each load.[5]

Following the Regional Director's investigation,[6] the hearing officer considered whether the October 20 announcement of changed policies interfered with the election. The hearing officer recommended overruling the objection. She found that, although the timing of the changes was "cause for concern," the changes were not objectionable because they were "de minimis" and not likely to cause fear within the bargaining unit. The Petitioner excepts, arguing that the hearing officer failed to take into account the scope of the changes, the closeness of the election, and the fact that the Employer offered no explanation for the timing of the announcement—so that employees reasonably would conclude that the changes were associated with the filing of the petition.

We find merit in the Petitioner's exceptions. When an objection is filed asserting that the "laboratory conditions" of an election were violated by a party to an election, the decisional standard is whether "the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place, Inc*., 268 NLRB 868, 868 (1984).[7] As the objecting party, the

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] All dates hereafter are 2004 unless otherwise indicated.

[3] The hearing officer sustained the Petitioner's objection and recommended setting aside the election based on the Employer's statement to employees at an early November meeting about Gordon Food Services' likely reaction to a vote in favor of the Petitioner. In light of our decision to set aside the election on the basis of the conduct described above, we find it unnecessary to address the Petitioner's objection to the early November statement, to the Employer's reading of Gordon Food Services' November 30 letter to employees, or to Supervisor Kyle Buckingham's statement to employee Patrick Terris on the same subject or our dissenting colleague's discussion of the same.

[4] Buckingham testified that he understand that the Employer had read a similar letter to the other shifts.

[5] The hearing officer found that the 4-hour limit issue was not noticed for hearing and, therefore, should not be considered. The Petitioner did not except to this ruling.

[6] As the hearing officer noted in her report, objectionable conduct discovered through the investigatory process, even if not raised in an objection by a party, properly can form the basis for setting aside an election. See *Dyncorp*, 343 NLRB No. 124 (2004); *Armstrong Machine Co.*, 343 NLRB No. 122 (2004).

[7] Conversely, in an unfair labor practice proceeding, the question, regarding alleged unlawful employer conduct, is whether it may reasonably tend "to interfere with, restrain, or coerce" Sec. 7 rights, or—or, regarding union conduct, whether it may reasonably tend to "restrain or coerce" those rights. *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946); *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852–853 (3d Cir. 1964), cert. denied 379 U.S. 826 (1964).

The dissent discusses, at considerable length, the elements that must be shown in unfair labor practice cases. This is an objection case, and contrary to the dissent, this case involves elements that are sufficient to establish that objectionable conduct has occurred. Thus, as more fully

Union has the burden of proving interference with the election. See, e.g., *Jensen Pre-Cast*, 290 NLRB 547 (1988). The test, an objective one, is whether the employer's conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001). We find that this test is amply met here.

As even the hearing officer acknowledged, the announcement of the new work rules to the unit employees during the critical period raises a serious concern about the impact of the announcement on the outcome of the election. What the hearing officer overlooked, however, is how this concern is greatly compounded by the Employer's failure to explain the timing of the announcement. See *Carter's, Inc.*, 339 NLRB 1089 (2003) (promulgation of changes to work rules during the critical period raised an inference of coercion, absent another explanation for timing). The announcement here was extremely close in time to the filing of the petition. A mere 5 days after the filing of the petition the Employer made its announcement. See *Shore & Ocean Services, Inc.*, 307 NLRB 1051, 1051 (1992) (announcement of change shortly after employer learned of filing of petition without explanation for timing is objectionable).

The hearing officer also trivialized the magnitude of the changes. It is undisputed that prior to the October 20 announcement the Employer did not put limits on the employees' eating and drinking in the waiting room.[8] The record evidence also shows that following the announcement the employees' behavior in the waiting room was altered. Similarly, the requirement that the lumpers not on assignment assist other lumpers, instead of awaiting assignments in the waiting room, and only take one break, was a change from the Employer's previous policy. Prior to October 20, the record shows that lumpers on occasion voluntarily assisted others, but also took unscheduled breaks when not on an assignment. The announcement that they were now compelled to help others marked an increase in such incidents and a decrease in breaks other than the lumpers' 1 a.m. lunchbreak.

Another error made by the hearing officer in minimizing these changes is her disregard for the Employer's own characterization of the changes. The testimony shows that Operations Manager Watson, in his October 20 letter, announced that the work rules contained therein were new. In addition, the record shows that Buckingham told employees that they would be written up or reprimanded if they did not follow the new rules. Even if enforcement of the new rules was less than rigorous, the threat of enforcement hung over the employees. The evidence of the existence of that threat can be seen in the testimony that the rules altered employees' behavior. And, as Buckingham acknowledged, the Employer *never* rescinded the new rules.

Where, as here, a shift of only two votes would alter the outcome of the election, we find that these kinds of changes, announced to employees almost immediately after the Employer learned of the election petition, presented without any explanation as to the timing, and never rescinded, constitute objectionable conduct sufficient to warrant setting aside the election.[9]

The dissent would overrule this objection. Although our colleague concedes that a grant of benefits during the critical period can influence employees to vote against the union (employer fist inside the velvet glove), he argues that—with limited exceptions—a detrimental change would not because "reasonable employers [would neither] . . . seek to sway their employees' votes by making changes that will upset and alienate their workforce," nor provide unions with a "golden campaign opportunity." This argument misses the mark. The issue is not employer motive, or what prudent employers would (or would not) do. The issue is whether the detrimental change would reasonably have an impact on *employee* free choice. We believe that an employee would reasonably view the detrimental change, instituted, within days of the filing of an election petition, as retaliation against union activity, and would fear future detrimental changes were the union selected. Indeed, employees likely would view the detrimental changes as a display of employer might against which the Union would be powerless to protect employees. *Lake Mary Health & Rehabilitation*, supra. Although it is theoretically possible that some employees might be so incensed at the Employer action as to vote for the Union, as we stated in *Lake Mary Health & Rehabilitation*, where the employer canceled employee benefits during the critical period,

discussed above, the new rules constituted a detrimental change that was announced to unit employees promptly after the petition was filed; the change was never explained or rescinded; and the change resulted in an alteration in employee conduct. Finally, the vote was close; only a two-vote change would have affected the election results.

[8] Our dissenting colleague attempts to dismiss the significance of the new restrictions on eating and drinking in the waiting room by noting that the source of the restriction was a Gordon Food Service rule. However, the Respondent promulgated the rule here as one of its own. Thus, an employee would break his/her own employer's rule, and face potential discipline. There is no evidence that this was the case before the announcement.

[9] The dissent concedes, as it must, that our analysis comports with the extant Board law of *Lake Mary Health & Rehabilitation*, 345 NLRB No. 37 (2005). Further, unlike the dissent, we do not speculate as to the outcome in other "hypothetical" situations, such as the one the dissent poses. Instead, our analysis is based on the application of the governing precedent to the circumstances of this particular case. More particularly, the dissent's hypothetical involves a single rule that employees cease spitting chewing gum on a dock. The instant case involves multiple requirements: (1) lumpers who are not on assignment must assist other lumpers; (2) lumpers can only take one break; (3) lumpers cannot eat or drink at all in the waiting room; and (4) lumpers can no longer spend time between assignments in the waiting room. Without passing on the hypothetical rule of "stop spitting gum on the dock," suffice it to say that the rules here are more numerous and (except for the third one) have a direct impact on the performance of work.

"[i]t is extremely doubtful that a reasonable employee would infer that the Employer's message was to influence the employees to vote for the union." On the contrary, we believe that the other response (set forth above) is at least as likely.[10]

Also contrary to the dissent, we have not engaged in speculation. We acknowledge that some employees may be incensed by detrimental changes. However, other employees may reasonably be fearful that union activity will engender further adverse actions. After all, employers use carrots and sticks to deter unionization (e.g., promise and *threats*, grants and *take backs*).

Contrary to the dissent, we see no difficulty in a Board's Member's inference that a "reasonable employee" would react in a certain way to certain conduct. That is implicit in any objective test, and Board Members and courts, based on experience, regularly and prudently perform this task.

The dissent further argues that the new work rules are not objectionable because nonunion employers are not required to explain any rule changes made at any time. Again, the dissent misconstrues our holding. While we do not require the Employer to explain its conduct, by not doing so, it will be held liable for the effect those new rules reasonably would have on employees when instituted promptly after the petition was filed.

Nor do we agree with the dissent that "any impact the announcement might have had would have dissipated prior to the election." The record shows that the Employer announced its rule change to the unit employees—without explanation, within days of the filing of the petition, and accompanied that announcement with a threat of discipline if the rules were not followed. Further, contrary to the dissent's assertions, the record demonstrates that employees' behavior remained altered after the rules were announced.

Finally, we disagree with the dissent's claim that we have "abrogate[d] employee free choice and overturn[ed] safeguarded, secret ballot elections." To the contrary, our holding seeks to preserve employee free choice by ensuring that the employees' vote is not influenced by a detrimental change in work rules, made during the critical period, which was neither explained to employees, nor rescinded prior to the election. By directing a new election we are preserving employee free choice.

2. *Interrogation/Impression of Surveillance*—In late October, lumper Patrick Terris visited Supervisor James Jones at his home. The visit was a social occasion. During the visit, Jones asked Terris generally about what was going on with the union at work. Terris attempted not to answer by shrugging. Jones pursued the inquiry by telling Terris that he did not have to lie about the situation because the lumpers' union activities were not a secret. He then told Terris that "they" knew that lumper Mike Morrison had initiated the union activities. Terris telephoned Morrison the next day to tell him what Jones had said about him. At the time of the exchange between Terris and Jones, Morrison had not conducted his union activities openly.

The hearing officer recommended overruling the objection related to the Terris-Jones conversation. She found that the conversation was personal and de minimis. The Petitioner excepts, arguing that the hearing officer improperly relied on the social context of the conversation to dismiss its potentially coercive impact.

Again, we find merit in the Petitioner's exception. The conditions under which the interrogation took place support a finding that it was objectionable. It was conducted by a supervisor. Jones gave no legitimate explanation for his inquiry. Moreover, the hearing officer improperly concluded that because Terris and Jones were friends and were in a social setting Jones' inquiry could not be coercive. The Board, however, has repeatedly found that the existence of a personal relationship between an interrogating supervisor and an interrogated employee does not preclude a finding of coercion. See *Acme Bus Corp.*, 320 NLRB 458, 458 (1995), enfd. 198 F.3d 233 (2d Cir. 1999); *Mariposa Press*, 272 NLRB 528, 541 (1984); *Graham Architectural Products Corp.*, 259 NLRB 1174, 1174 (1982).

Despite Jones' clear interrogation of Terris, the dissent argues that because Jones informed Terris that he already knew about the Union Jones "was not probing for information" about the Union. We reject this argument. After expressly interrogating Terris about the Union, Jones did not halt his questioning when Terris evaded answering. To the contrary, Jones pursued the questioning by advising Terris that he did not have to lie because Jones already knew of some union activities. Rather than demonstrating that Jones was not seeking a response, Jones' reference to union activities in the context of his questioning Terris reasonably would be understood by the latter as a solicitation of further information about the Union. For example, Jones would want to know about *Terris'* involvement with the Union.

Terris' response to Jones' interrogation and his news that the lumpers' activities were being surveilled by management further demonstrates the coercive effect of the conversation. As the Board has long found, an employee's untruthful response to an interrogation into his union activities is indicative of coercion. See *Armstrong Machine Co.*, 343 NLRB No. 122 (2004). Terris did not tell Jones what he knew about the lumpers' activities. In feigning ignorance as to the status of the organizing campaign, Terris did not respond truthfully to Jones' inquiry.

[10] For the reasons stated by the majority in *Lake Mary Health Care Associates*, above, we continue to adhere to extant Board law and reject the dissent's assertion that detrimental changes to work rules during the critical period do not upset the atmosphere in an election campaign.

Jones' conversation with Terris also conveyed the impression of surveillance. The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that employees' union activities had been placed under surveillance. See *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Morrison testified that prior to Terris' conversation he was not conducting his union activities openly. Thus, Jones' assertion that the Employer knew who, namely Morrison, had initiated union activity would have conveyed surveillance. Terris' conduct demonstrates that he believed that it conveyed surveillance. He found Jones' revelation about the Employer's knowledge significant enough to warn Morrison about it shortly after his conversation with Jones. Accordingly, we find Jones' statements to be objectionable.

The dissent says that the reason for the inquiry was evident from the question itself, i.e., Jones was curious. We disagree. The purpose of the inquiry was not self-evident. There could be numerous reasons for the question. One of them may be curiosity, but another is to find out, as an agent of the Employer, about the union activities of Jones and others. Further, even if Jones' motive was simply idle curiosity, motive is not the test.

Our dissenting colleague attempts to minimize the potential coercive effect of the interrogation by labeling it "isolated." As discussed above, however, it was not isolated. It immediately preceded Jones' objectionable conduct in creating an impression of surveillance. Even the dissent agrees that Jones followed up on his questioning of Terris by creating the impression of surveillance. When the interrogation and impression of surveillance are viewed together, they demonstrate that Jones was probing Terris for information, not innocently expressing curiosity.

Contrary to the hearing officer and our dissenting colleague, we find Jones' conduct sufficient to set aside the election. In light of the fact that a swing of only two votes in the election would change the outcome, Terris' dissemination of Jones' objectionable conduct to just one other employee, Morrison, is sufficient to warrant setting aside the election. This is especially true in light of the other objectionable conduct found, which affected most, if not all, of the unit.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Local 337, International Brotherhood of Teamsters.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with the requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. July 28, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

I fully agree, for the reasons stated in the majority opinion, that the critical-period work rule changes at issue here warrant a new election. I write separately only to further address the dissent.

Member Schaumber argues that *detrimental* preelection work rule changes are fundamentally different from *beneficial* changes. He says

> Reasonable employers do not seek to sway their employees' votes by making unilateral changes that will upset and alienate their workforce. Indeed, such conduct hands the union a golden campaign opportunity.

> Any competent union organizer would seize on such an announcement as a reason to vote union, explaining to employees that once they are represented, the employer will no longer be able to change the rules without bargaining with the Union.

This is a wholly unprecedented distinction, a departure from longstanding objections case law.[1] In any case, the dissent's approach, even if accepted, misses what clearly seems to be going on here.

These work changes, whether by design or consequence, would foreseeably inhibit union-related conversations between the lumpers, during the ongoing organizing campaign, by minimizing opportunities for them to congregate in the waiting room. Under the new rules,

> (1) lumpers would no longer be permitted to eat and drink anything other than bottled water in the waiting room;
>
> (2) lumpers were no longer permitted to spend time between assignments in the waiting room;
>
> (3) between assignments, lumpers were required to assist other lumpers;
>
> (4) lumpers' only break would be their 1:00 am to 1:30 am lunch break; and
>
> (5) lumpers were not permitted to take more than 4 hours on each load.

Even if a union organizer sought to seize on these restrictions as a campaign issue, they would still serve to hinder the union's efforts.

Dated, Washington, D.C. July 28, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Double J Services, Inc. (the Employer) employs "lumpers" whose job it is to unload trucks at the Brighton, Michigan facility of Gordon Food Services (GFS). On October 15, 2004,[1] Local 337, International Brotherhood of Teamsters (the Union), filed a petition to represent the Employer's lumpers. The election was conducted on December 2, with the employees rejecting representation by the Union by a vote of 9 to 6. The Union filed several objections. The majority finds merit in some of those objections and sets aside the election without passing on the remaining objections. In my view, none of the Union's objections warrant a new election. I would issue a certification of results.

1. *Announcement of work rules, some of which effected no change and some of which effected a detrimental change*: The Union alleged as objectionable the Employer's announcement, on October 20, of the following rules: (a) no eating or drinking in the waiting room except bottled water; (b) no spending idle time sitting in the waiting room but instead lumpers are to help their coworkers unload their trucks; (c) lumpers will not be paid for helping coworkers unload their trucks; (d) breaktime is from 1 to 1:30 a.m.[2] Two of these rules, (b) and (c), were nothing new. As to rule (c), it was already the case that lumpers were not paid for helping unload trucks other than their assigned trucks. As to rule (b), union witness Michael Morrison testified that the requirement of helping coworkers unload their trucks during idle time was not new, and the directive not to spend idle time sitting in the waiting room was just another way of saying the same thing.

Unlike rules (b) and (c), rules (a) and (d) were new. However, the hearing officer correctly found that they were de minimis. As to rule (a), there is no dispute that unit employees provide services to GFS on GFS's property, and GFS prohibits food and drink except bottled water on the dock and the warehouse floor. Thus, the rule against food and drink in the waiting room was simply a corollary of GFS's rule. That leaves rule (d), which employees ignored and the Employer never enforced. Morrison testified that after October 20 as before, employees took breaks at times other that 1 to 1:30 a.m. Employee Patrick Terris testified to the same effect, and also testified that he was unaware of any employees being disciplined for taking breaks outside the 1 to 1:30 a.m. time slot. Third-shift Supervisor Kyle Buckingham testified that he did not enforce the 1 to 1:30 a.m. break rule. Because rule (d) was routinely disregarded and never enforced, and because almost a month and a half elapsed between the October 20 announcement and the December 2 election, it would be purely speculative to infer that the announcement had any impact on the election.[3]

Even assuming, however, that the announced changes could somehow be characterized as more than de minimis, I would still not set aside the election on that basis.

[1] See., e.g., *Keller Columbus, Inc*., 215 NLRB 723, 726 (1974) ("In short, an employer is not to bestow either benefits or detriments upon its employees during a union campaign if the reason for granting the benefit (or detriment) is the presence and activity of the Union."); *Carter's Inc*., 339 NLRB 1089, 1093 (2003) (new election ordered based on beneficial and detrimental changes to employees' working conditions).

[1] All dates are 2004 unless otherwise indicated.

[2] There may have been an additional rule requiring lumpers to spend no more than 4 hours on each load, but the Union acknowledges in its exceptions brief that this rule was not noticed for hearing and is therefore not adjudicable.

[3] Given the fact that rules (b) and (c) were not new, they obviously did not minimize any existing opportunities for union-related conversations. Nor would a rule limiting beverage consumption to water (rule (a)) meaningfully impair employees' ability to congregate or discuss the Union. Rule (d) was routinely ignored, never enforced, and obviously had no impact on employee behavior during the brief period it existed.

To the extent the announced rules effected any change, it was to the employees' detriment, and there was no demonstrated nexus between the rule changes and the election such that employees reasonably would have viewed the changes as an attempt to interfere or coerce them in their choice on union representation.

As I explained in a recent decision, a distinction exists between alleged objectionable changes that benefit employees and those that are detrimental to employee interests. See *Lake Mary Health & Rehabilitation*, 345 NLRB No. 37, slip op. at 4–6 (Member Schaumber, dissenting in part). With respect to the former, when an employer announces or implements unexpected and unexplained grants of significant benefits to unit employees in close proximity to an election, the unit employees may well reasonably view the windfall as an attempt to influence their votes. This common sense principle gave rise to the Board's practice of inferring that an announcement or conferral of a benefit during the preelection critical period is coercive, shifting the burden to the employer to show, if it can, that it announced or conferred the benefit for a legitimate business reason unrelated to the pending election. See, e.g., *STAR, Inc.*, 337 NLRB 962, 962 (2002); *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991).

What is often forgotten, or at least more often honored in the breach, is that this inference of coercion only arises, at least in the context of an alleged unfair labor practice, if the General Counsel first proves, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc.*, 319 NLRB 916 (1995). If reasonable employees would not so view the grant of benefits, the conduct is not unlawful. In making this determination, the Board examines several factors, including the size of the benefit conferred, the number of employees receiving it, the timing of the benefit, and how employees reasonably would view the purpose of the benefit. *B & D Plastics*, 302 NLRB at 245;[4] *STAR, Inc.*, 337 NLRB at 962–963.[5] The Board applies this same exact test in assessing whether the conduct is objectionable in a representation proceeding. *DMI Distribution of Delaware*, 334 NLRB 409, 410 (2001); *Perdue Farms*, 323 NLRB 345, 352 (1997), enfd. in relevant part 144 F.3d 830 (D.C. Cir. 1998).[6]

Thus, pursuant to the *B & D Plastics* standard, the Board may not simply presume—even in the context of an unexplained grant of benefits during the critical period—that the grant of benefits is objectionable. Rather, the Board must first assess whether the General Counsel, or here the objecting party,[7] has carried its initial burden of proof, examining a variety of factors, including, significantly, how employees reasonably would perceive the conduct.

Where the alleged objectionable change is detrimental to employees, the common sense inference discussed above loses much of its force. Reasonable employers do not seek to sway their employees' votes by making unilateral changes that will upset and alienate their work force. Indeed, such conduct hands the union a golden campaign opportunity. Any competent union organizer would seize on such an announcement as a reason to vote union, explaining to employees that once they are represented, the employer will no longer be able to change rules without bargaining with the Union. Because reasonable employers would not pursue such a course of action to influence their employees' votes, reasonable employees are unlikely to perceive such conduct as an attempt to interfere with or coerce them in their choice

[4] Applying this test in *B & D Plastics*, the Board explained:

> In this case, 2 days before the election the Employer conferred on all unit employees, with no strings attached, a day off with pay solely in connection with its admitted purpose to deliver the final message in its antiunion campaign. Thus, employees, including those who elected not to attend the cookout and listen to the Employer's [campaign] speeches, received what was tantamount to a substantial bonus for no other reason than the upcoming election. *Employees could reasonably have viewed this conduct as intended to influence their votes in favor of the Employer's position.* The grant of such a benefit in these circumstances constitutes objectionable conduct sufficient to require that the election results be overturned unless the Employer comes forward with a persuasive business justification for granting the benefit when it did.

[Emphasis added.]

[5] Similarly, in *STAR, Inc.*, the Board found objectionable a sizable and unprecedented cash bonus announced and distributed by the Employer just 2 weeks before the election, stating:

> Applying [the *B & D Plastics*] standard here, we find good reasons to infer that the year end bonus interfered with free choice in the election. Its size (as much as $400) was substantial, all of the [unit] employees received it, *and all of them reasonably would have been influenced in their voting*, especially given the timing of the bonus and its unprecedented features. As we will explain, the Employer has not succeeded in demonstrating that conformity to past practice explains the timing or grant of the bonus.

[Emphasis added.]

[6] The majority misses the point when it attempts to explain, at considerable length, the difference between the standard applicable in representation and cases and unfair labor practice proceedings. My point is that extant Board law clearly holds that the same *B & D Plastics* elements must be examined in both contexts, a point the majority fails to acknowledge. See *MI Distribution of Delaware* and *Perdue Farms*, supra. Similarly, in both contexts the party challenging the allegedly unlawful or objectionable conduct bears the burden of proof, and in the context of an election objection, the burden is "a heavy one." See fn. 7, infra.

[7] "[T]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of employees. Accordingly, the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB No. 10, slip op. at 2 (2005) (citations and internal quotations omitted).

on union representation[8]—the prima facie case that must be establish under our precedent.

That is not to say that adverse changes may never constitute objectionable conduct. In limited circumstances, the Board has found that the delay (or announcement of delay) of a wage increase or the imposition of some other detrimental change constituted objectionable conduct, but only where a demonstrable causal nexus exists between the detriment and the election such that "employees would reasonably perceive that the Union's campaign had caused them to suffer an economic detriment." *Comet Electric*, 314 NLRB 1215 (1994).[9]

My concurring colleague overstates both my position and Board precedent when she claims that I draw an unprecedented distinction between benefit and detriment scenarios. As stated above, I agree that detrimental changes can be objectionable so long as there is a sufficient nexus between the detrimental change and the election campaign such that employees would reasonably perceive the change as an attempt to influence their vote. That position is entirely consistent with Board precedent. See, e.g., *Comet Electric*, supra. Further, I maintain, consistent with ample Board precedent cited herein, that, whether benefit or detriment, the Board may not simply presume objectionable conduct from the fact of the change; rather, the Board must apply a reasoned analysis assessing the nature of the change, its timing, the number of employees affected and how the employees would reasonably perceive the change. See generally *B&D Plastics*, supra. Finally, I maintain that because employees are less likely to perceive a detrimental change as an attempt to influence their vote, there must be greater evidence of a nexus to the election campaign than would be required in the context of a benefit awarded during the critical period. Again, that requirement is nothing new and is readily apparent from a reading of cases actually addressing detrimental changes. See, e.g., fn. 9, supra.[10]

In the instant case, the objecting party failed to carry its "heavy burden" of establishing a nexus between the rule changes at issue and the election such that employees would reasonably perceive the changes either as an attempt to influence their votes in the election or, as alleged by my colleagues, an attempt to retaliate against employees for filing the petition. First, as noted by the hearing officer, the Employer made no statements, and engaged in no other conduct, linking the rule changes in any way either to the election or to the filing of the petition. Cf. *Comet Electric* and *Martin Industries*, supra. Second, the Employer never enforced the changes, and those employees who bothered to adhere to them did so for no more than a week. Hence, any "detriment" incurred by the employees was trivial, and, the Hearing Officer found, instilled no fear among them. Indeed, the majority of the employees simply ignored the announcement altogether.[11] Thus my colleagues' specula-

[8] My colleagues appear to concede as much, as they do not argue that employees would perceive the change as an attempt to influence the outcome of the election, but rather as an act of retaliation for the employees' filing of an election petition.

[9] In *Comet Electric*, the employer forced virtually all of its employees to attend a 2-1/2-hour antiunion captive audience speech on payday, withheld employee paychecks until the conclusion of the meeting, and did not pay the employees for most of the time spent in the meeting, which extended well beyond the close of the normal workday. Under those circumstances, the Board concluded that the employees would reasonably perceive that the Union's campaign had caused them to suffer an economic detriment and that "by failing to pay employees for the time spent in the meeting and by delaying their paychecks, it effectively punished them for seeking union representation." 314 NLRB at 1215–1216. See also *Martin Industries*, 290 NLRB 857, 860 (1988) (adopting judge's findings of 8(a)(3) and (1) violations where historic merit wage increases were granted to other employees but admittedly withheld from employees in the petitioned-for unit because of pending representation case and only after employees selected the union; under such circumstances, unit employees "would clearly attribute the loss of wages to the successful union campaign.").

[10] Neither of the cases cited by my concurring colleague are to the contrary. In *Keller Columbus, Inc.*, 215 NLRB 723 (1974), the employer, upon learning of a union organizing drive, promised employees wage increases and a 4-day workweek. The employer admitted, and the judge agreed, that the promises were intended to dissuade employees from organizing. After the petition was filed, the employer then announced that it could not go forward with the increases because of the union presence and pending petition. Unlike the present case, the employer admittedly promised benefits for the express purpose of undermining the election campaign. Unlike the instant case, the employer then withheld those benefits, explicitly blaming the union and pending election for its failure to follow through on the promises. A more direct nexus between the election and both the promised benefits and the threat to withhold them is hard to imagine. *Carter's, Inc.*, 339 NLRB 1089 (2003), unlike the present case, involved alleged unfair labor practices, which, once found by the judge, were deemed a fortiori objectionable under the Board's *Dal-Tex Optical Co.* standard, 137 NLRB 1782 (1962). Moreover, the facts there stand in stark contrast to the instant case. In *Carters, Inc.*, the employer stipulated to a re-run election after the union filed objections to an earlier vote. At the behest of a consultant engaged to defeat the union, the employer then instituted a panoply of new benefits, announced them to the employees shortly before the election, and trumpeted those benefits as reasons to vote against the union in its campaign propaganda. The employer also instituted a handbook containing other new favorable terms and certain detrimental changes, including new restrictions on employee access to company property on nonworking time and distribution of literature (as well as a request to report trickery or coercion relating to union authorization cards)—changes clearly discernable as related to the organizing effort. In finding that the employer's unlawful conduct adversely affected the laboratory conditions, the judge relied specifically on the number and severity of unfair labor practices. In the instant case, no unfair labor practices have been alleged or found, there were no promises of benefits, there was no tie between the announced rules and campaign propaganda, the rule changes were not obviously intended to impede organizing, the rule changes were neither enforced nor repromulgated close to the election, and there was no pattern of improper conduct designed to interfere with the election outcome.

[11] The majority claims that the record establishes that employees' behavior remained altered after the rules were announced, but fails to explain in what manner or for how long the behavior was altered or why that alteration would have impaired the ability of the employees to vote their conscience.

tion that employees would interpret the changes as "retaliation" and "would fear future detrimental changes if the union were selected" is just that, mere speculation. Third, the employees ceased adhering to the rules by October 27, more than a month prior to the secret-ballot election. Thus, any impact the announcement might have had would have dissipated prior to the election. In short, the hearing officer properly analyzed the nature and impact of the changes (modest), the number of employees actually affected (few, as most ignored the rules and those who adhered to them did so for no more than a week), the timing in relation to the election (far removed), and the manner in which the changes were perceived by employees (a short-lived irritant that caused no fear), and reasonably concluded, consistent with Board precedent, that the Employer's announcement did not constitute objectionable conduct.

My colleagues make much of the fact that the Employer did not explain the timing of the announcement. However, nonunion employers are not required to explain to employees why they are implementing rule changes or why they have chosen to do so at a given time. Similarly, Board precedent makes clear that in the context of alleged unlawful or objectionable conduct, the burden does not shift to an employer to explain *anything* until the General Counsel or objecting party has satisfied its prima facie case. As the forgoing discussion and report of the Hearing Officer make clear, the Petitioner failed to carry that heavy burden here.

The standard applied by the majority is one that has unfortunately devolved to the point of a presumption, one wholly divorced from the principles that gave rise to it. I am aware of no case, and the majority cites none, that establishes as the test of objectionable conduct the elements outlined in the majority opinion.[12] Indeed, the flaws in the majority's proposed standard are obvious.

Consider the following hypothetical:[13] an employer receives a complaint from the property owner, for whom it provides transportation services, that the employer's employees are leaving chewing gum on the loading dock. The employer announces to employees, shortly after the filing of an election petition, that employees are not to spit gum on the dock, but does not explain this change in rules. ["a detrimental change that was announced to unit employees promptly after the petition was filed; the change was never explained or rescinded"]. Employees cease spitting gum for a day or two then revert to their old behavior. ["[T]he change resulted in an alteration of employee conduct"]. No employee is punished or disciplined. A month later the election proves close. ["the vote was close; only a two vote change would have affected the election results"]. Under the majority's standard, we would negate the results of a Board-conducted and supervised secret ballot election, despite the absence of any unfair labor practices, any nexus between the rule change and the election, and any actual factual basis to conclude that the rule change might have had a material impact on the employees' free choice exercised in the sanctity of the ballot booth. Instead, it is enough that a Board member or two, in this case contrary to the hearing officer's findings, subjectively perceives that a "reasonable employee" would view the gum rule as an act of retaliation, and would so fear other future trivial and unenforced rule changes, that he or she would be unable to cast an uncoerced ballot.[14] The "I know it when I see it standard" did not work well in other adjudicative contexts, and it will not serve the Board well either. I would not so easily abrogate employee free choice and overturn safeguarded, secret-ballot elections on the basis of presumptions couched in terms of an objective standard. The Supreme Court has instructed the Board that its presumptions "must rest on a sound factual connection between the proved and inferred facts," *NLRB v. Baptist Hospital*, 442 U.S. 773, 787 (1979). Because no such connection exists here, I respectfully dissent.

2. *Alleged interrogation:* In late October, employee Terris paid a social visit on Supervisor James Jones at Jones' house. Jones was not and never had been Terris' supervisor, and they never had worked on the same shift. Jones asked Terris if he had heard anything about the Union or what was going on with the union thing, and Terris shrugged. Based on the totality of the circumstances,[15] the hearing officer found that Jones did not coercively interrogate Terris.

I agree. Jones posed a general question about the Union. In essence, he asked Terris for news. He did not ask Terris about Terris' union views or those of other employees. In addition, Jones is not and never has been Terris' supervisor. Jones and Terris are friends, and the question was posed casually during a social visit. Moreover, as partly explained above and more fully explained below, the Employer's conduct during the critical period was, with one exception, otherwise unobjectionable. Thus, the background of the question, the nature of the information sought, the identity of the questioner, and the place and method of interrogation all militate against a

[12] With the notable exception of the recent case of *Lake Mary Health & Rehabilitation*, 345 NLRB No. 37 (2005), in which I dissented.

[13] I am compelled to pose a hypothetical because the standard articulated by my colleagues (see majority fn. 7) cannot be found in Board precedent. It appears clear that applying that standard would result in overturning the election in the hypothetical I pose, an outcome the majority does not disclaim.

[14] No employee testified that they were coerced, intimidated or even influenced by the short-lived changes, and the hearing officer, who heard the relevant evidence, flatly rejected the "inference" drawn by my colleagues. The primary difficulty with my colleague's ad hoc and subjective assessment of how a reasonable employee would react is the lack of predictability and guidance such a standard affords our constituents.

[15] See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

finding of coercive interrogation. See *Rossmore House*, supra at 1178 fn. 20 (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)).

My colleagues find Jones' question objectionable, but their rationale is insufficient to support that finding. To begin with, they point out that Jones is a supervisor. That is not, of course, a "circumstance" under the *Rossmore House* test. Rather, it is a prerequisite to the objection itself. If Jones were not an agent of the Employer, the question he asked would not be attributable to the Employer and therefore could not even be alleged as objectionable. It would be relevant under *Rossmore House* to consider whether Jones was a *high-level* supervisor. The Union does not contend, and the majority does not find, that he was.

The majority next states that Jones "gave no legitimate explanation for his inquiry." The reason for the inquiry was evident from the question itself: Jones was curious. Moreover, because the question was not one that Terris reasonably would have viewed as calculated to obtain information on which to base taking action against himself or other employees, it did not need explaining in order to negate an otherwise coercive effect. Indeed, given the innocuous generality of the question, any explanation would have tended to create the very coercive atmosphere that the majority faults Jones for not dispelling.

The majority next assigns error to the hearing officer for finding that Jones' question "could not be coercive" because Jones and Terris are friends and the question was asked in a social setting. But the hearing officer did not so find. In overruling the interrogation objection, she expressly relied on "the overall circumstances," not on friendship and social setting alone. The majority also states that the existence of a personal relationship between a questioning supervisor and a questioned employee does not preclude a finding of coercion. I agree. Under the *Rossmore House* totality of the circumstances test, no one circumstance is dispositive. In some other case, the ameliorating circumstances of friendship and casual setting may turn out to be more than offset by other, coercive circumstances. Nevertheless, the fact that the isolated question in this case was posed by a friend in a social setting rather than, for example, by an upper-level manager in the manager's office behind closed doors *does* weigh against a finding of coercive interrogation. Thus, the hearing officer properly relied on those circumstances, among others, in finding no coercion.

Finally, having found no merit in the other circumstances my colleagues cite, I find the remaining circumstances the majority relies on—the fact that Terris did not answer Jones's question and that Jones also told Terris that the "Union thing" was not a secret and that they knew Mike Morrison started it—insufficient to sustain a finding of coercive interrogation when weighed against the several circumstances, discussed above, favoring the opposite finding. With regard to Jones' remark about what the Employer knew, I agree, as explained below, that the statement created an impression of surveillance; but I disagree that shows, as the majority believes, that in asking Terris for news about the Union, Jones was probing Terris for information. On the contrary, by revealing that he already knew about the "Union thing" and who had initiated it, Jones conveyed to Terris that he was *not* probing for information upon which to base taking action against employees because he had no need to do so. Accordingly, for the foregoing reasons, I would overrule the interrogation objection.

3. *Alleged impression of surveillance*: In the same late October conversation between Jones and Terris, Jones told Terris that the "Union thing" was not a secret and that they knew Mike Morrison started it. Terris testified that he telephoned Morrison to tell him what Jones had said, and Morrison testified that he became openly prounion only after the telephone call from Terris. Based on this evidence, I agree with my colleagues that the Employer created an impression of surveillance.

That does not end the analysis, however. Whether Jones' statement constitutes objectionable conduct materially affecting the results of the election depends on several factors, including the extent to which the statement was disseminated. See, e.g., *Caron International, Inc.*, 246 NLRB 1120 (1979). When he visited Jones, Terris was accompanied only by his brother, who is not employed by the Employer. Thus, Terris was the only employee who heard the statement at issue. Terris told Morrison what Jones said, but there is no evidence that Jones' statement was disseminated any further. After the telephone call from Terris, Morrison openly supported the Union. In addition, he served as the Union's observer at the election, and he testified for the Union at the hearing. Given Morrison's open union partisanship, it would be contrary to common sense to think that Morrison's vote could have been affected by Jones' statement. That leaves Terris as the sole employee whose vote could have been affected. The vote was 9 to 6 against the Union; a 1-vote swing would not have changed the outcome. Thus, Jones' statement by itself does not warrant a new election.

4. *Alleged threats of job loss*: In early November, John Watson, the Employer's general manager, convened a meeting with as many as 15 of the lumpers. According to Morrison, Watson told employees that he had been working with GFS for over 20 years and that GFS did not allow union members to work on their docks or in their buildings. According to Terris, Watson said that he had been doing business with GFS for a while, that he knew their procedures, and that GFS did not deal with union people whatsoever or do any kind of work with them. Employee Ramsey Thomas-Darling testified to similar effect; and Morrison, Terris, and Thomas-Darling

each testified that Watson told employees that voting the Union in would threaten their job security.

Watson essentially corroborated the foregoing testimony. Watson also testified that, prior to the early November meeting at which he made the statements recounted above, representatives of GFS told Watson that if the union drive were successful, GFS would have to take a "serious look" at the Employer continuing to provide services to GFS.

Watson met with the lumpers a second time near the end of November, just a few days before the December 2 election. At this meeting, Watson read aloud from a letter he had received from GFS. The letter stated, in relevant part, as follows: "[I]f the upcoming election results in Double J employees being represented by a union, Gordon Food Service will promptly terminate our business relationship at the Brighton location."

The hearing officer found Watson's early November statements objectionable because, as of that date, there was no direct evidence that a union victory would result in the Employer losing GFS's business. I disagree with this finding.

Under the familiar settled standard for evaluating the impact of statements such as Watson's, an employer

> is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). Applying this standard here, I find Watson's early November remarks unobjectionable. No party disputes the accuracy of Watson's statements to the effect that GFS would not deal with union employees or permit them on its property, and consequently that voting union would threaten employees' job security. On that basis alone, those statements are properly viewed as objective fact. See *TNT Logistics North America, Inc.*, 345 NLRB No. 21, slip op. at 2 (2005). Here, however, Watson also gave undisputed testimony that representatives of GFS told him, *before* the early November meeting, that unionization would result in GFS taking a "serious look" at continuing to do business with the Employer. Thus, Watson clearly had an objective factual basis for believing that GFS would terminate its business relationship with the Employer if the lumpers voted union. Accordingly, Watson permissibly conveyed to employees his belief, based on objective fact, as to demonstrably probable consequences beyond the Employer's control.[16]

Moreover, even if, as the hearing officer found, Watson's early November statements lacked a basis in objective fact at the time they were made, I would still reject the hearing officer's recommendation to set the election aside. Mere days before the election, the employees heard Watson read GFS's statement that a union victory would cause GFS to terminate its business relationship with the Employer. If the prospect of job loss caused employees to vote against union representation, it was because of GFS's assurances, immediately before the election, of what it would do in the event of a union victory, not because of Watson's month-old statement of what he believed GFS would do. And, as the hearing officer correctly found, it was not objectionable for Watson to have read GFS's letter to the lumpers. See *Curwood, Inc.*, 339 NLRB 1137, 1137–1138 (2003) (finding lawful under *Gissel* an employer's informing employees of customers' concerns about possible unionization), enfd. in relevant part 397 F.3d 548 (7th Cir. 2005); *Eagle Transport Corp.*, 327 NLRB 1210 (1999) (finding unobjectionable under *Gissel* an employer's posting of customers' letters stating that if employer's drivers unionized, customers might need to make other business arrangements). Thus, even if Watson's early November statements had been objectionable, they were subsumed by his unobjectionable reading of GFS's own assurances to the same effect and therefore could not have materially affected the election.

In sum, only the Union's impression of surveillance objection has any merit, and that undisseminated incident could not have materially affected the election. Accordingly, for the foregoing reasons, I would overrule the Union's objections and issue a certification of results.

Dated, Washington, D.C. July 28, 2006

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[16] Similarly, no party disputes the accuracy of Supervisor Kyle Buckingham's statement to Terris, after the early November meeting, that GFS would never put up with a union. Thus, that statement is also based on objective fact and permissible under *Gissel*, supra.